85-1261

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

IN RE THE MATTER OF MORRISON SINGLE COUNTY DITCH NO. 1330
(FLOYD AND RITA MEYERS-vs.-THE SENECA COUNTY, OHIO BOARD OF COMMISSIONERS)

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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ISSUES ON MOTION TO DISMISS

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

LISTS OF PARTIES TO THIS APPEAL

1. Floyd and Rita Meyers, represented by Attorney J. Vincent Buchanan, Buchanan & Stotzer, 8500 U.S. 23 North, Risingsun, Ohio 43457, and Attorney William Caughey, 221 E. Front, Pemberville, Ohio 43450, who is counsel of record.

2. The Seneca County, Ohio Board of Commissioners, in their official capacity, represented by Prosecuting Attorney of Seneca County, Ohio, Mr. Steve C. Shuff, and Special Assistant Prosecuting Attorney, Ms. Elaine Knutson, 106 E. Market Street, Tiffin, Ohio 44883, and Attorney Donald James Guernsey, 142 West Tiffin Street, Fostoria, Ohio, 44883, who is counsel of record.

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VERBATIM RECITATION OF RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATION

The full text of the relevant constitutional provisions and statutes are set out in the appendices herein. The specific appendices are listed in the Table of Authorities and Reference to the Official and Unofficial Reports.

The text of "County Ditch Assessments" by Kenneth J. Yost, Preble County Engineer is not set forth herein in the interests of brevity since it is set forth in full in the Appellants' Jurisdictional Statement in Appendix I, page 116.

STATEMENT OF FACTS

This ditch improvement was petitioned by landowners in the Morrison Ditch watershed. The Seneca County Board of Commissioners viewed the ditch on March 11, 1975. The Preliminary Report of the County Engineer on March 27, 1975, stated that the project length needed to be extended. The original hearing on March 27, 1975, was continued in order to notify landowners who were in the watershed as extended. On April 24, 1975, a second hearing was held. The Board of Commissioners passed a resolution finding for the improvement on April 24, 1975. The Schedule of Assessments and Engineer's Report were filed with the Clerk of the Seneca County Board of Commissioners along with maps and a set of construction plans. The Final Hearing on the Engineer's

report and estimated assessments was scheduled for March 24, 1981. On April 7, 1981, the Board of County Commissioners, by resolution, confirmed the assessments and ordered the letting of contracts for construction of the project.

The Board of County Commissioners' decision of April 7, 1981, was appealed to the Seneca County Common Pleas Court on April 24, 1981. The Common Pleas Court ordered the Seneca County Engineer's Office to recompute the assessments based upon the fact that several landowners had excavated dirt from the ditch on their own. The Seneca County Engineer's Office rechecked the profiles and refigured the assessments taking into account the dirt which had been excavated. This resulted in a lower project cost since the amount of dirt to be excavated was reduced. The excava-

tions were not done according to the project specifications, slopes were not seeded or protected, and some over-excavation occurred. Basically, they simply dug a trench with no attention to the plan or erosion control.

The Appellants presented several witnesses. Donald Hall was presented as a drainage expert. He was shown photos of the Appellants' farm (Exhibit D). He testified that he observed little or no ditch there. (Transcript I, p. 40) He also testified that the assessment method used (Preble County Method) appears to be reasonable. (T. I, p. 40) The ditch, as shown to the witness prior to the petiton, he testified, would not drain any substantial amount of water. As the ditch was petitioned, the Meyers' property required a high degree of correction. (T. I, p. 42-43) Mr. Hall

also stated that photograph 30 in Exhibit F (a photograph of the Meyers' property) had a bank that was a "little steeper than it should be," that "some soil will erode from that bank," and that there is no cover on that bank. (T.I.,, p. 43) Mr. Hall would also recommend a two to one slope for this area (two feet horizontally for every foot vertically). In addition, Mr. Hall stated that he found the construction plans to be excellent (T. I., p. 50).

The Appellants then called Gene Baltes from the Seneca Soil Conservation Service who testified as to soil types in the area.

The next witness was Dale Phillips who is a part-time excavator. He testified that he would estimate the present bank slope as a one to one and that the slope does erode easily. (T., p. 86) He also testified as to costs to exca-

vate the project. Upon cross-examination he indicated that his estimate did not include building or excavating to the specifications of the plans,and did not include rip-rap (stone placed in strategic areas to lessen erosion) or seeding of the banks. (T. I., p. 87) Mr. Phillips further indicated that he does not check for "free-board" for tile (distance between drainage tile and bottom of the ditch).

The Appellants then presented the testimony of Terry McConnell who also does excavation. He testified that part of the ditch which he recently cleaned had silted back in. (T. I., p. 99)

The Appellants also called Clayton Meyers, a landowner, who stated he was in favor of the drainage project. (T. I., p. 108)

The Appellants next called Preston

Spencer, Seneca County Engineer, in regard to the project.

Finally, one of the Appellants, Floyd Meyers, testified. Mr. Meyers testified that he has to open up the ditch every two or three years. Mr. Meyers testimony cannot reasonably he summarized as it was quite confusing and unclear. At one point he testifed as follows:

> We was figuring on plowing to get it loose and plow it through to get all that ground loose, because it was all about shut, and get that ground loose, and it was opened up for two weeks more, and it was right in the middle of summer, and it shows if he opened it up it would be under water like some of these other pictures. It was done in the middle of summer in the dry season, it was done, and that is when most of this work was done too, in the middle summer in the dry weather." (T. II., pp. 22-23)

Mr. Meyers presented some bills but was not sure just what lands they were for.

He also presented some photographs but did not know just when they were taken.

The Appellees then presented their case. James Homan, an employee of the Seneca County Engineer's Office testified that in 1975 there was standing water all over Appellants' property (farm that abuts Kuntz property) and that the channel was hard to find and then it just kind of disappeared. (T. II., pp. 38-39) He also testified that the channel appeared to be farmed right across. (T, II., p. 45)

C. Leverne Wertz, a County Commmissioner in Seneca County testified next. He stated that when he viewed the ditch on March 11, 1975 there was wheat stubble growing right through the ditch. (T. II., p. 64) There was no bank on the Appellants' property, it was practically level. (T. II., p. 65) He also testified that he could see cultivation

marks through the field where the ditch should be (again referring to Appellants' property. (T. II., P. 70)

Robert Stoneham, an employee for the Seneca County Engineer's Office then testified. He explained the procedures used to figure assessments using the "Preble County Method." T. II., pp. 90-100 and 104-108)

The next witness was Virgil Kuntz who testified that he owns a farm next to the Appellants. The Appellants have owned the farm since approximately 1958. (T. II, p. 103) He stated that he observed practically no channel through Appellants' land and that the Appellants use the creek area as farm land and he goes right through it. (T, II., p. 103) Mr. Kuntz also testified that the Meyers' farm had flooding -- big ponds, big lakes, big flat areas of water about

any time it rained. (T. II., p. 103)

Mr. Robert Stoneham then testified further regarding the preparation of assessment figures and the mechanics of figuring the assessments using the "Preble County Method."

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The issue of assessments in situations such as drainage are functions of state law. The State of Ohio has set forth the factors to be considered in making assessments for drainage improvements.

Assessments for improvements, such as those imposed by Ohio drainage laws are founded upon the principle that the benefit derived from the improvement is different from the general benefits enjoyed by the public from the improvement. Such assessments are based on the doctrine of enhanced values - the assessments are lawful and constitutional to the extent the costs of assessments provide benefits equal to or in excess of the costs assessed.

One of the earliest cases to examine the issue of special assessments for improvements was Norwood v. Baker, 172 U.S. 269, 43 L. Ed. 443, 19 S. Ct. 187 (1898). This was soon followed by several cases which discussed special assessments in regard to various improvements.

Generally, these cases, while dealing with different improvements, found that the determination of benefits is a legislative function. Thus, there is no violation of the 14th Amendment to the United States Constitution since the assessments are based upon the benefits received. See Laskey v. Hilty, 91 O. App. 136 (1951) for an excellent discussion of these cases as applied to special assessments in Ohio.

The assessment method used by the Seneca County Engineer, known as the "Preble County Method" and approved by the Seneca County Commissioners on April

7, 1981, meets the criteria and guidelines set forth by Sections 6131.01 and 6131.15 of the Ohio Revised Code as effective prior to April 9, 1981. Section 6131.01 and 6131.15 of the Ohio Revised Code prior to April 9, 1981, are set forth in Appendix B and D herein and as effective April 9, 1981, in Appendix C and E herein.

The main difference in the Section 6131.01 Ohio Revised Code versions appears to be the renumbering of the paragraphs so that the contents of the earlier version Paragraph G are incorporated into Paragraph F of the April 9, 1981 version. In addition, environmental, wildlife, and recreational improvements are to be considered in the post April 9, 1981 version. In Section 6131.15 Ohio Revised Code the newer

version requires the Engineer to give primary consideration to the potential increase in productivity that the parcel may experience.

In the Appellants' case, the testimony and evidence was that there was little if any ditch on his property, that his property frequently became a lake or pond or "looked like the Mississippi River." The testimony and photographs also demonstrated that the Appellants had plowed through the area in one portion where the ditch should be. The elimination of Appellants' flooding and the prevention of soil erosion will certainly increase Appellants' potential productivity and is of great benefit to them.

Whereas Appellants refer to Sections 6131.01 and 6131.15 of the Ohio Revised Code, Appellants fail to note that these sections were amended as of

April 9, 1981, after the assessments and resolution by the County Commissioners approving this project. Appellants herein only cite these sections as they became effective on and after April 9, 1981. Appellants do not recognize the statutes as they existed during the time the assessments were made and the Resolution to Proceed with the improvement by the Seneca County Board of County Commissioners (which is the subject of this appeal) was made on April 7, 1981. It clearly appears that the applicable law should be that law in effect at the time the assessments and resolution to proceed occured.

It should be noted that the trial court required the Engineer to recalculate the assessments subsequent to April 9, 1981, in order to determine the costs of the proposed improvements based on

the fact that several landowners had excavated portions of the ditch on their own. No other changes in the assessments were made and the refiguring only took into account factual changes made during the pendency of the action in amounts of dirt to be excavated. (See Appendix A for Common Pleas Journal Entry)

The Appellants cite a number of Ohio cases which they claim support their position. An examination of these cases shows that many of them relate to cases in which the lands to be assessed received little or no benefit. The Appellees herein do not disagree with the proposition that an assessment cannot be placed on private property for the sole benefit of another but submit that the assessment herein for the drainage improvement is of great benefit to the lands owned by Appellants.

In the case off In Re County Ditch, 122 O.S. 226 (1930) the court indicated that the assessments must be in proportion to the benefits accruing to each property. Based upon the evidence at the Common Pleas level, it is clear that the Appellants' lands will benefit greatly and more than the neighboring lands since Appellants have the most extensive flooding problems, no channel for the water in places and the most extensive erosion problems.

In Chamberlain v. City of Cleveland 34 O.S. 55, (1878) the court indicated in the syllabus the following:

> 1. To enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment, and specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred thereby.

This holding in Chamberlain is consistent with the facts in the instant case since the evidence showed that the Appellants herein would receive substantial benefits in excess of the costs asssessed. Appellants also cite Walsh v. Barron, Treas., 61 O.S. 55 (1899) and Blue et al. v. Wentz et al. 54 O.S. 547 (1896). Both of these cases also found that assessments may be levied in regard to the benefits which accrue to the land from such project. It should be noted that the law has changed since the Blue case substantially since it also held that lands which had natural drainage had no obligation to pay for water leaving such lands.

In Alma Coal Co., v. Cozad,79 O.S. 348 (1909) the court found that Alma Coal Co. would derive no benefit from a fence between its property (a below

surface coal mine with unused waste land on the surface) and the neighboring property and thus could not be assessed for a portion of the fence's cost.

The Alma Coal case is distinguishable from the instant case since Appellants herein clearly receive benefits for the proposed improvement.

Appellees herein further submit that the very factors which make Appellants land, their benefits and their assessments unique and within the framework of "benefits" received by their lands are the real basis of their objections. They object because their assessments are different from the assessments on neighboring lands. The very objective of the assessment procedures as set forth in Ohio statutes and case law is based on individual assessments of benefits received. The Appellants had no channel in areas (even

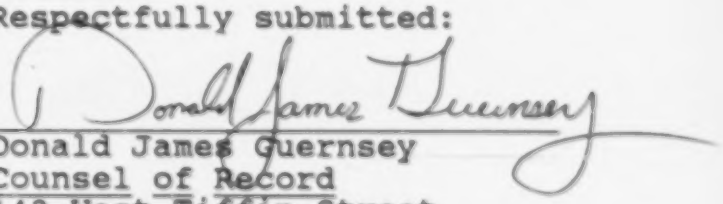
after their so-called "excavation" the evidence showed the channel was a shallow plow furrow which was totally inadequate in terms of depth, capacity to carry water, and protection on slope or banks to prevent erosion). The evidence also showed that the Appellants had the most extensive flooding and erosion--some of it apparently caused by their farming through the drainage area. Thus, the Appellants' Degree of Need of Problem Correction was substantially greater than any of their neighbors and the Degree of Problem Correction by the project in regard to Appellants' lands was considerably higher than their neighbors who had a ditch and channel for the water.

The entire case is a state law issue - assessments are within the legislative function. The State of Ohio

has set forth drainage assessment criteria, and the method used in the instant case is reasonable and met the criteria set forth by Ohio statutes in effect at the time. The evidence supports the assessment made on Appellants' lands.

There is no substantial federal question and, thus, this appeal should be dismissed.

Respectfully submitted:



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APPENDICES

APPENDIX A

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

IN THE MATTER OF:

THE APPEAL IN THE MORRISON SINGLE COUNTY DITCH NO. 1330

Case No. 40443
Miscellaneous

PETITIONED FOR by Marie Yennie, Ruth Gore, Virgil Kuntz and others

JUDGMENT ENTRY

This matter came before the Court this 16th day of November, 1981 for a pre-trial and for a view of the ditch pursuant to the previous order of the Court.

The Court, having viewed the ditch and the lands through which it passes, finds that several of the landowners have made substantial changes in the portion of the ditch which goes through

their respective properties.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the property owners make no further changes in the ditch subsequent to December 15, 1981, so that the engineers can make a final determination.

It is further ORDERED, ADJUDGED, and DECREED that the Seneca County Engineer's Office re-survey the lands which have undergone substantial changes since the time of the original survey and make a re-determination of the factors and assessments invclved based on the new survey.

It is further ORDERED, ADJUDGED, and DECREED that the additional costs of such engineering be assessed to the project.

s/Peter M. Handwork
JUDGE

This entry prepared by:
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APPENDIX B

SECTION 6131.01 OHIO REVISED CODE EFFECTIVE PRIOR TO APRIL 9, 1981

As used in sections 6131.01 to 6131.64, inclusive of the Revised Code:

(A) "Owner" means any owner of any right, title, estate, or interest in or to any real property, and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state of Ohio, and the trustees of any state, county, or municipal public institution. "Owner" also includes any public corporation and the director of any department, office, or institution

of the state affected by an improvement, not owning any right, title, estate, or interest in or to any real property.

(B) "Land" includes any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property, and all structure, or fixtures attached to real property, including but not restricted to all railroads, roads, electric railroads, street railroads, streets, and street improvements, telephone, telegraph and transmission lines, underground cables, gas, sewage, and water systems, pipe lines and rights of way of public service corporations, and all other real property whether public or private.

(C) "Improvement" includes:

(1) The location, construction, reconstruction, reconditioning, widen-

ing, deepening, straightening, altering, boxing, tiling, filling, walling, arching, or any change in the course, location or terminus of any ditch, drain, watercourse or floodway;

(2) The deepening, widening, straightening, or any change in the course, location, or terminus of a river, creek, or run;

(3) A levee, or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;

(4) The vacating of a ditch or drain.

(D) "Person" means natural person, firm, partnership, association or corporation, other than public

corporations.

(E) "Public corporation" or "political subdivision" means counties, townships, municipal corporations, school districts, park districts, turnpikes, toll bridges, conservancy districts, and all other governmental agencies clothed with the power of levying general or special taxes.

(F) "Benefit" or "benefits" means advantages to land, and owners, to public corporations as entities, and to the state of Ohio, resulting from drainage, conservation, and control and management of water. In determining benefits, consideration shall be given to:

(1) The watershed or entire land area drained or affected by the improvement;

(2) The total volume of water draining into or through the improve-

ment, and the amount of water contributed by each land owner;

(3) The use to be made of the improvement by any owner, public corporation, or the state of Ohio.

(G) "Benefits" include any or all of the following factors:

(1) Elimination or reduction of damage from flood;

(2) Removal of water conditions that jeopardize public health, safety, or welfare;

(3) Increased value of land resulting from the improvement;

(4) Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto;

(5) Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improve-

ment is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands which have been removed from their natural state by deforestation, cultivation, artificial drainage, urban development or other man-made causes, shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from said uplands.

APPENDIX C

SECTION 6131.01 OHIO REVISED CODE

EFFECTIVE AFTER APRIL 9, 1981

As used in sections 6131.01 to 6131.64 of the Revised Code:

(A) "Owner" means any owner of any right, title, estate, or interest in or to any real property and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state, and the trustees of any state, county, or municipal public institution. "Owner" also includes any public corporation and the director of any department, office or institution of the state affected by an improvement but not own-

ing any right, title, estate, or interest in or to any real property.

(B) "Land" includes any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property, and all structures or fixtures attached to real property, including but not restricted to all railroads, roads, electric railroads, street railroads, streets and street improvements, telephone, telegraph, and transmission lines, underground cables, gas, sewage, and water systems, pipe lines and rights of way of public service corporations, and all other real property whether public or private.

(C) "Improvement" includes:

(1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering,

boxing, tiling, filling, walling, arching, or any change in the course, location, or terminus of any ditch, drain, watercourse, or floodway;

(2) The deepening, widening, or straightening or any other change in the course, location, or terminus or a river, creek, or run;

(3) A levee or any wall, embankment, jetty, dike, dam sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;

(4) The removal of obstructions such as silt bars, log jams, debris,and drift from any ditch, drain, watercourse, floodway, river, creek, or run;

(5) The vacating of a ditch or drain.

(D) "Person" means natural person, firm, partnership, association, or corporation, other than public corporations.

(E) "Public corporation" or "political subdivision" means counties, townships, municipal corporations, school districts, park districts, turnpikes, toll bridges, conservancy districts, and all other governmental agencies clothed with the power of levying general or special taxes.

(F) "Benefit" or "benefits," except as ordered in section 6131.31 of the Revised Code, means advantages to land and owners, to public corporations as entities, and to the state resulting from drainage, conservation, control and management of water, and environmental, wildlife, and recreational improvements. Factors relevant to whether such advan-

tages result include:

(1) The watershed or entire land area drained or affected by the improvement;

(2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;

(3) The use to be made of the improvement by any owner, public corporation, or the state.

"Benefit" or "benefits" includes any or all of the following factors:

Elimination or reduction of damage from flood;

Removal of water conditions that jeopardize public health, safety, or welfare;

Increased value of land resulting from the improvement;

Use of water for irrigation, storage, regulation of stream flow, soil

conservation, water supply, or any other purpose incidental thereto;

Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands that have been removed from their natural state by deforestation, cultivation, artificial drainage, urban development, or other manmade causes shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from the upland.

(G) "Environmentally significant areas" mean natural land or water areas that in some degree retain or have reestablished their natural character or

have other features of scientific or educational interest such as rare or endangered plant and animal populations or geologic, scenic, or other natural features and, because of their values and functions, contribute to the community's general welfare.

APPENDIX D

SECTION 6131.15 OHIO REVISED CODE EFFECTIVE PRIOR TO APRIL 9, 1981

During the survey and preparation of plans, the county engineer shall appraise the benefits accruing to public corporations and any department, office, or institution of the state. He shall determine the per cent of total construction cost of the improvement which each public corporation and any department, office, or institution of the state shall be assessed by reason of the benefit to public health, safety, convenience, and welfare, or as the means of improving any street, road, or highway under the control or ownership of such public corporation or any department, office, or institution of the state, or for benefit to any land

owned by any public corporation or any department, office, or institution of the state. He shall prepare a schedule of assessments containing the name and address of each public corporation and each department, office, or institution of the state so benefited, the amount of the appraised assessment and an explanation of the benefits upon which the assessment is based.

The county engineer shall prepare a second schedule of assessments containing the name and address of each private owner of land and a description of the land believed to be benefited by the proposed improvement, which names and descriptions shall be taken from the tax duplicates of the county. He shall enter in such schedule the amount of the appraised assessment to be assessed to each tract of land, and an explanation

of the benefits, by reason of the construction of the improvement, upon which the assessment is based. The total of these appraised assessments plus the total appraised assessments allocated to public corporations and the state shall equal the estimated cost of the proposed improvement.

The county engineer shall also appraise the value of land or other property necessary to be taken and the damages to be sustained by any owner as a result of the construction of the proposed improvement and the subsequent maintenance of such improvement. He shall prepare a schedule of damages containing the name and address of each owner appraised to be damaged, the amount of the appraised damages, and an explanation of the injury upon which said appraisal is based. The engineer's schedule of damages shall also contain

the value of the land or other property necessary to be taken, and the name and address of the owner, and a complete description of such land or other property. He shall include the total of such appraised damages and valuations as part of his estimate of the total cost of constructing the improvement.

The county engineer, in making his estimate of the amount to be assessed each tract of land, public corporation, and the state in accordance with this section, and the board of county commissioners, in amending, correcting, confirming, and approving the assessments in accordance with section 6131.22 of the Revised Code, shall levy the assessments according to benefits. All land, public corporations, and the state affected by an improvement shall be assessed in the proportion that it is

specially benefited by the improvement, as "benefit" and "improvement" are defined in section 6131.01 of the Revised Code, and not otherwise.

APPENDIX E

SECTION 6131.15 OHIO REVISED CODE

EFFECTIVE AFTER APRIL 9, 1981

The county engineer shall estimate the benefits accruing to public corporations and any department, office, or institution of the state. The engineer shall determine the estimated cost of the improvement that each public corporation and any department, office, or institution of the state shall be assessed by reason of the benefit to the public health, safety, convenience, the environment, wildlife, recreation, and welfare, or as the means of improving any street, road, or highway under the control or ownership of any public corporation or any department, office, or institution of the state, or for benefit to any land owned by any public corporation or any department, office,

or institution of the state. The engineer shall prepare a schedule of assessments containing the name and address of each public corporation and each department, office, or institution of the state so benefited, the amount of the estimated assessment, and an explanation of the assessment if the assessment is for purposes other than drainage.

The county engineer shall also include in the schedule of assessments the name and address of each private owner of land and a description of the land believed to be benefited by the proposed improvement, which names and descriptions shall be taken from the tax duplicates of the county. The engineer shall enter in the schedule the amount of the estimated assessment, which in no case shall be less than ten dollars, to be assessed to each tract of land an an explanation of the assessment, if the

assessment is for purposes other than drainage, by reason of the construction of the improvement upon which the assessment is based. The total of these estimated assessments including the total estimated assessments allocated to public corporations and the state shall equal the estimated cost of the proposed improvement.

In determining the estimated drainage assesssments for a parcel, the county engineer shall give primary consideration to the potential increase in productivity that the parcel may experience as a result of the improvement and shall also give consideration to the quantity of drainage contributed, the relative location of the property to the project, the portion of the project through which the drainage from the parcel flows, the value of the project

to the watershed, and benefits as defined in section 6131.01 of the Revised Code.

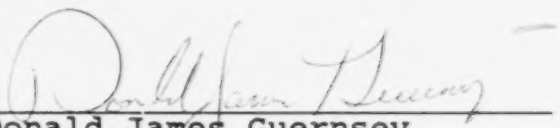
The county engineer shall also estimate the value of land or other property necessary to be taken and the damages to be sustained by any owner as a result of the construction of the proposed improvement and the subsequent maintenance of the improvement. The engineer shall prepare a schedule of damages containing the name and address of each owner alleged to be damaged, the amount of the estimated damages, and an explanation of the injury upon which the estimate is based. The engineer's schedule of damages shall also contain the value of the land or other property necessary to be taken, the name and address of the owner, and a complete description of the land or other property. The engineer shall include

the total of the estimated damages and valuations as part of his estimate of the total cost of constructing the improvement.

The county engineer, in making his estimate of the amount to be assessed each tract of land, each public corporation, and the state in accordance with this section, and the board of county commissioners, in amending, correcting, confirming, and approving the assessments in accordance with section 6131.22 of the Revised code, shall levy the assessments according to benefits. Each tract of land and public corporation affected by an improvement and the state shall be assessed in the proportion that each is benefited by the improvement, as "benefit" and "improvement" are defined in section 6131.01 of the Revised Code, and not otherwise.

CERTIFICATE OF SERVICE

I, Donald James Guernsey, being Counsel of Record, hereby certify that, in accordance with United States Supreme Court Rule 28.5(b) three copies of this Motion to Dismiss were deposited at the United States Post Office in Tiffin, Ohio, with first class postage prepaid, addressed to Counsel of Record, William Caughey, 221 East Front Street, Pemberville, Ohio 43450 on the 7th day of March, 1986.



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